FOR ARGUMENT

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL 751,
Petitioner,
v.
BROWN GROUP, INC., d/b/a BROWN SHOE COMPANY,
Respondent.

**On a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit**

REPLY BRIEF FOR PETITIONER

JONATHAN P. HIATT
815 16th Street, N.W.
Washington, D.C. 20006

MARSHA S. BERZON
SCOTT A. KRONLAND
MARY LYNNE WERLWAS
177 Post Street, Suite 300
San Francisco, CA 94108

GEORGE MURPHY
RENEE L. BOWSER
1775 K Street, N.W.
Washington, D.C. 20006

LAURENCE GOLD
(Counsel of Record)
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

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REPLY BRIEF FOR PETITIONER

1. Brown Shoe's threshold argument is that Congress did not, in the WARN Act, provide that labor organizations meeting the statutory definition of "representative" may bring a suit such as this one. That Congress did so provide could not be more clear.

A. WARN § 2104(a)(5) provides expressly that on a violation of the Act's notice requirements, among those persons who may sue "seeking to enforce [the resulting statutory] liability" are a "representative of employees or a unit of local government aggrieved under paragraph (1) or (3)." Section 2104(a)(1), in turn, provides for a monetary payment to each "aggrieved employee" in the event of noncompliance with the notice provisions. "Representative" is then defined elsewhere in the statute as "an exclusive representative of employees." § 2102(a)(4). "Aggrieved employee" is also a defined term—"an employee who . . . , as a result of the failure by the employer to comply with section 2102 of this title, did not receive timely notice either directly or through his or her representative as required by section 2102 of this title." § 2104(a)(7).

The pertinent language of § 2104(a)(5), then, in terms, authorizes a "representative", as defined by the statute, of "employees . . . aggrieved", as defined by the statute, to sue for "such liability" as the statute provides those employees when their employer does not properly notify their representative of a plant closing or mass layoff.

Brown Shoe, however, maintains that § 2104(a)(5) does not mean what it so plainly says on its face. According to respondent, the word "aggrieved" in § 2104(a)(5) is intended to modify not "employees" in the phrase "representative of employees" but "representative", and "a union as the statutory 'representative of employees' is not 'aggrieved under paragraph (1) . . .'" Brief for Respondent (Resp. Br.) at 11. But § 2104(a)(5) does not depend gramatically upon the *representative* being one of the persons § 2104(a)(1) denominates as

"aggrieved" and on that account entitled to the statutory liability established there. Rather, it is sufficient, as recounted above, that the union be the "representative" of "*employees* . . . aggrieved." That Brown Shoe chooses in its brief to italicize the entire § 2104(a)(5) phrase in question *except* "of employees" (Resp. Br. at 11) before proceeding with its analysis of the critical statutory language demonstrates that its interpretation does not grammatically account for those two words but, instead, proceeds as if those words were not part of the text.

Indeed, since there is no WARN Act lawsuit that a "representative of employees," could file other than one for employee monetary relief,[1] Brown Shoe's construction would render a complete nullity not only the term "of employees" in § 2104(a)(5), but the longer phrase "including a representative of employees . . . aggrieved" as well, in violation of long-established principles of statutory construction. *Astoria Fed. Sav. & Loan Ass'n v. Solomino*, 501 U.S. 104, 112 (1991) ("But of course we construe statutes, where possible so as to avoid rendering superfluous any parts thereof"). The half-hearted suggestion made to meet this abnegation of express statutory language—that the "reference to a 'representative' . . . contemplated the maintenance of class actions" (Resp. Br. at 13 n.5)—does not fill the gap. Congress was, as noted, careful in the WARN Act to give us the precise meaning of "representative" "[a]s used in this chapter" (§ 2101(a)(4))—and that meaning is *not* that the "representative" is *a class action* representative.[2]

The WARN Act's language and structure, consequently, lead inescapably to the conclusion that Congress meant

[1] The WARN Act expressly precludes remedies other than those spelled out. 29 U.S.C. § 2104(b).

[2] Brown Shoe's suggestion as to the role of the term "representative" is inconsistent as well with the structure of the remainder of § 2104(a)(5). That section goes on to provide for suits on behalf of "such person or . . . other persons similarly situated." There is, of course, no point in providing twice for class litigation in a single provision.

to permit exclusive representatives to file suit to enforce the statutory liability for monetary payments to individual employees in the event of employer non-compliance with the statute's notification requirement.[3]

Once Brown Shoe's manifest misreading of the statutory language is exposed, respondent's arguments about the anomalies supposedly created by a common sense reading of that language collapse. The statute is comfortably read sequentially, so that the "representative of employees . . . aggrieved" can sue for the liability due those employees (under § 2104(a)(1)), while "a unit of local government aggrieved" can sue for the penalties due that unit (under § 2104(a)(3)). And, to the objection that the class action language does not make sense as applied to suits by representatives (Resp. Br. at 12), the obvious answer is that the language was not intended to cover such suits but other suits, by individually aggrieved employees. The statute does not *require* that cases be brought for others similarly situated, and the statute therefore makes perfect sense by applying the class action language to employee suits and not to representative suits.

B. Nor is it true—even if it were relevant—that the provision for suits by representatives as defined in the WARN Act "was not a conscious appointment of a union as vindicator of its members' rights but rather a mere remnant of the previous proposal in which the union was actually afforded its own rights and remedy." Resp. Br.

[3] It was obvious to those concerned with the passage of the WARN Act that unions could file suit for monetary relief payable to employees. This awareness is perhaps best illustrated by the fact that in the 1987 hearings on the bill, the NAM's representative complained not that unions could sue but that employees could also sue. *See* Hearings before the Subcommittees on Labor-Management Relations and Employment Opportunities on H.R. 1122, 100th Cong., 2d Sess. (Mar. 17, 1987) ("Hearing") at 119 (remarks of J. Bruce Johnson on behalf of the National Association of Manufacturers) ("the bill leaves open the possibility that suits may be brought by employees . . . even if unions or other employee representatives do not sue.")

at 14. The evolution of the statutory provisions confirms, instead, that from an early point in the statute's evolution Congress specifically intended to permit statutory representatives to bring suit for the statutory monetary payments due to individual employees under § 2104(a)(1).

So far as we can tell, the present WARN § 2104(a)(5) began life in 1985, as the second sentence of what is now § 2104(a)(1), worded so that the section read:

> Any employer who orders a plant closing or mass layoff in violation or this Act . . . shall be liable to each employee who suffers an employment loss as a result of such closing or layoff for reinstatement or damages, or both. A person seeking to enforce such liability (including a representative of employees) may sue for himself or for other persons similiary situated, or both in any district court of the United States in which the violation is alleged to have occurred or in which the employer transacts business. [H.R. 1616 § 6(c), 99th Cong. 1st Sess., as introduced March 20, 1985.]

See also H.R. 1616 § 7(b), as reported to the House of Representatives (October 29, 1985) (same language); H.R. Rep. No. 99-336, 99th Cong. 1st Sess. (1985) at 24 (summarizing the enforcement provision quoted above);[4] Substitute for H.R. 1616, 131 Cong. Rec. H 10213 (Nov. 14, 1985) § 7(a)(1) (same language, execpt that "reinstatement" no longer appears and suit can be filed only for "back pay and related benefits for each day of such

[4] The House Report refutes Brown Shoe's insistence that the provisions regarding who may file suit are essentially venue provisions. Resp. Br. at 12. The Report after stating the statutory liability to each employee, states:

> A person (including an employee representative) seeking to enforce such liability may sue either for himself or for other persons similarly situated. Suits may be brought in federal district court for any district in which the violation is alleged to have occurred . . . . [*Id.* at 24]

This paraphrase, by summarizing in separate sentences the standing and venue aspects of the paragraph, makes clear that the provision is more than simply a venue provision.

violation, not to exceed a total of 90 days.") Under this language, it was crystal clear that the "such liability" for which an exclusive representative could bring suit was precisely the liability for monetary payments to individual employees for employer failure to comply with the statute.

After H.R. 1616 failed (*see* Brief for Petitioner (Pet. Br.) at 20), new bills were introduced in the next Congress. Those bills were drafted to be more specific about the nature of the monetary relief available to individual employees, with the result that as now, that relief was described in detail in separate, numbered subparagraphs. Presumably as a result of this growing complexity, the provision regarding authority to bring suit for that relief was moved in the House bill into a separate, immediately following subsection (H.R. 1122 (100th Cong. 1st Sess. Feb. 18, 1987) §§ 355(a)(1) and (2)), and additional subsections (b)(1) and (2) were added providing for liability to units of local government ((1)) and for enforcement of that liability ((2)). In the Senate bill, the provision regarding liability for failure to fulfill statutory obligations to units of local governments became (a)(2), and a new, catchall enforcement section became (a)(3).[5] S. 538 (100th Cong. 1st Sess. Feb. 19, 1987). In both instances, the term "such liability" was retained, and in neither instance was there any monetary relief running to the representative itself, rather than to individual employees and to units of government. Thus, it is apparent that no pertinent change from the 1985 versions was intended; rather, the minor alterations in the enforcement section resulted from the need to take structural account of the other statutory changes, not here pertinent.

In the Senate committee, further changes were made in the enforcement provision, but of the same housekeeping character: That committee added a statutory monetary

[5] That section read:

> A person seeking to enforce such liability (including a representative of employees (or a unit of local government) may sue either for himself or for other persons similarly situated, or both, in any district court of the United States . . . [sic].

penalty for failure to provide information on request to the "representative of the affected employees" or the "unit of local government" (S. 538 as reported, 100th Cong. 1st Sess. 1987, §§ 333, 334(a)(3)), and some clarifying provisions regarding liability in its subsections (4) and (5). The enforcement language therefore was moved to subsection (6), and was drafted to read:

> A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1), (2), or (3), may sue either for such person or for other persons similarly situated . . .

Brown Shoe would have it that the intent of this language was to permit unions to sue *only* for violations of (3), the provision for monetary relief for failure to provide requested information. But, as shown above, the express authorization for statutory representatives to file suit was in the legislation *before* there was any monetary relief accorded to such representatives, and was from the outset directly linked to the liability for monetary relief to individual employees. Further, even taken in isolation, Brown Shoe's explanation of the Senate committee enforcement language won't wash: That language *includes* subsection (1), the liability to individual employee subsection, among those on which "a representative of employees . . . aggrieved" may sue. And, the inclusion of subsection (1) would, contrary to statutory interpretation rules, have no function under Brown Shoe's explanation.[6]

The Conference report followed, with regard to enforcement, the basic scheme of the Senate bill. But, since the bill no longer contained the section requiring that information be provided and therefore provided no relief

[6] The House committee did not add a statutory penalty for failure to provide information, and left the enforcement provision authorizing suits by a "representative of employees" where it had been in the House bill as introduced—immediately after, and pertaining only to, the section establishing liability for monetary relief to individual employees; separate subsections provided for penalties payable to and enforcement by units of local government. H.R. Rep. No. 100-285 (100th Cong., 1st Sess. 1987), at 46-47.

to anyone for failure to provide information, the reference to such relief in the enforcement provision was deleted. H.R. Conf. Rep. No. 100-576, 100th Cong. 2d Sess. at 463-64. Thus, the Conference version (which remained in the final bill after a veto and a separate reenactment of the WARN Act) was with respect to court enforcement basically a reprise of the Senate bill as introduced in 1987, which in turn was simply the second sentence of the original employee monetary relief section moved and expanded as a result of growing statutory complexity. The evolution of § 2104(a)(5), in short, makes clear that Congress specifically contemplated lawsuits like this one under the WARN Act, and expressed that intent consistently in the evolving statutory language.

2. Brown Shoe repeats the same error in its assertion that Congress' reference to union enforcement in § 2104(a)(5) was simply a mistake by maintaining that "the statute gave a union no right . . . concerning a notice." Resp. Br. at 14.[7] The Act in terms provides that before an employer orders a plant closing order, the employer must

[7] While Brown Shoe suggests that any injury to the union was inadequately pleaded here, the complaint tracks the statutory provisions as Congress wrote those provisions: The caption, specifying that UFCW Local 751 is suing "as representative of the aggrieved employees" (Jt. App. 7), closely paraphrases § 2104(a)(5). The complaint goes on to allege that the plaintiff is an "employee representative as defined by . . . the Act", and that "[t]he notice to William R. Treece was not in compliance with § 2102(a)(1) because William R. Treece is not the exclusive representative of the affected employees," as well as because the notice was untimely. Jt. App. 8, 9. The relief sought includes payment of backpay and benefits to each of the aggrieved employees, as the statute mandates. Jt. App. at 9-10.

In other words, the complaint alleges that Brown Shoe was supposed, under the statute, to provide statutory notice to the union but did not, and as a result the employer owes back pay and benefits under the Act to the employees the union represents. If, as we maintain, Congress was entitled to enact the statutory scheme these pleadings invoke, nothing in Article III of the Constitution requires

provide "written notice of such an order . . . to each representative of the affected employees." 29 U.S.C. § 2101(a). Notwithstanding these plain words, Brown Shoe insists that Congress "created the statutory notice requirement primarily for the benefit of non-union workers," and provided for notice to the statutory representative simply for the convenience of employers whose employees were organized. Resp. Br. at 14-15.[8]

A. With a statute this clear, it hardly matters *why* Congress chose to provide that the union representing employees, if there is one, must be notified of a plant closing, any more than it mattered in *Havens Realty Corp., supra, why* Congress chose to mandate that accurate information regarding the availability of real estate be provided even to individuals who have no need of that information because they are not in fact seeking to

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more precise pleading. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374-75 (1982) (the Article III requirement of injury in fact is satisfied by pleading "the denial of the [plaintiff's] own statutory right to truthful information;" facts in addition to the denial of a statutory right are necessary only if a party is seeking to rely on another individual's statutory rights, and must therefore plead facts demonstrating its own injury).

[8] Once again, Brown Shoe's argument here is at odds with the views of the NAM representative during the legislative consideration of the WARN Act. At that time the complaint was that "some of the largest unions . . . are . . . leaders in this effort to require mandated notification of plaint shutdown and layoffs" in an attempt to "expand their benefits through legislation . . . as proposed here" and thereby "concentrate all of their collective bargaining muscle on even higher wage demands . . . with the knowledge that Congress will provide the rest of the benefit package." Hearing, *supra*, at 92 (remarks of J. Bruce Johnson on behalf of the National Association of Manufacturers).

In any event, the fact that Congress in discussing a legislative proposal focusses on an application narrower than the range of applications the statute's actual language covers does not thereby narrow the statute's reach. "This Court has never required that every permissible application of a statute be expressly referred to in its legislative history." *Moskal v. United States*, 498 U.S. 103, 111 (1990).

rent or buy. Whatever Congress' purpose, where, as here, a statute provides that certain information is to be provided to specified individuals or entities, that statute thereby "in terms, establishes an enforceable right to truthful information;" where the requisite information is not so provided, the designated individual or entity "has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing . . ." 455 U.S. at 373-74.[9]

Brown Shoe seeks to avoid the clear holding of *Havens Realty* on the flimsy notion that in *Havens Realty* the statute declared it "unlawful" to refuse to provide the requite information. Resp. Br. at 19. In other words, according to Brown Shoe, the outcome of this case would be different if, instead of mandating that "An employer shall not order a plant closing" without providing the requisite notice "to each representative of the affected employees" (29 U.S.C. § 2102(a)), Congress had provided that "It shall be unlawful for an employer to order a plant closing" without providing that same notice. Nothing in *Havens Realty* indicates that this Court's standing holding in that case turned on such linguistic ephemera.

B. In any event, Congress did have cogent reasons, quite aside from mere convenience to employers, for providing that the notice obligation runs to unions and not merely to each employee in an organized plant. The Act's principal authors summarized those reasons in

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[9] Federal statutes providing that certain individuals by virtue of their status or actions are entitled to mandated information and permitting those individuals to enforce the obligation to provide the information, without any showing of injury other than the failure to receive the mandated information, are common. *See, e.g.*, Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq. *Robles v. EPA*, 484 F.2d 843, 847 (4th Cir. 1973) (right to maintain suit to compel disclosure under FOIA is not dependent "upon the interest or lack of interest of a party seeking disclosure"); Truth in Lending Act (TILA), 15 U.S.C. § 1601 et seq. *White v. Arlen Realty Development Corp.*, 540 F.2d 645, 649 (4th Cir. 1975) ("injury in fact" is satisfied under TILA by failure to receive information Congress required be disclosed).

a letter to the Secretary of Labor with regard to the Secretary's suggestion, in an early post-Act policy statement, that "the notice should be served on the closest or most direct representative of the affected employees (i.e. the local union(s)." *Worker Adjustment and Retraining Notification Act: Solicitation of Comments in Advance of Proposed or Interim Final Rulemaking: Discussion Paper*, 53 Fed. Reg. 43733 (October 28, 1988). The Act's authors objected that while it is desirable that local unions be notified as well, "the statute *requires* that the exclusive representative of the employees receive notice," for "a clear policy reason":

> As the collective bargaining agent, the exclusive representative, whether it be an international union, a regional union council or a local union, has the responsibility and authority to address changes in terms and conditions of employment, the effects of a plant closing or mass layoff, and cooperative efforts at worker readjustment. [Congressional Sponsors Joint Letter to U.S. Department of Labor, November 10, 1988, at 8, *reprinted* in Committee on Education and Labor, U.S. House of Representatives, *Legislative History of S.2527, 100th Congress, Worker Adjustment & Retraining Notification Act* (1990) ("*Leg. Hist.*") at 114.]

See also Brief for Petitioner (Pet. Br.) at 18 (summarizing similar statements during the legislative process); Brief for the United States as Amicus Curiae Supporting Petitioner at 15 (same); Preamble to Final Department of Labor Regulations, 54 Fed.Reg. 16042 (April 20, 1989) ("[T]he purpose of providing notice to the parties mentioned in the Act is to allow each of them to take responsible action.")

Moreover, the Department of Labor—expressly required by the Act to promulgate "interpretive regulations describing the methods by which employers may provide for appropriate service of notice as required by this chapter" (29 U.S.C. § 2107(a))—quite emphatically rejected the contention in crafting those regulations that

"the Union's only role under WARN . . . is to serve as the conduit to the affected employees for notice from the employer." Resp. Br. at 17. The final Department of Labor regulations do not adopt the Department's initial suggestion that notice be provided to the local union, but instead provide for notice to the exclusive representative, with only the recommendation that notice be given to local union officials as well if the local union is not the representative.[10] 20 C.F.R. § 639.6; 53 Fed. Reg. 49065 (December 5, 1988). Those regulations also specify somewhat different requirements for the content of notices to exclusive representatives and to individual employees (20 C.F.R. § 639.7(c) and (d)), "designed to provide information necessary for each of them to take responsible action." Preamble to Final WARN Regulations ("Preamble"), 54 Fed. Reg. 16059 (April 20, 1989). And, in response to suggestions made during the regulatory comment period that the regulations mandate notice to individual employees where there is an exclusive representative, the Department concluded that requiring either the employer or the union to provide such notice would be inappropriate:

> [A] commenter suggested that non-members of a union should receive individual notice. . . . WARN provides that, where there is a representative of affected employees as of the time of notice, an employer must provide notice to that representative rather than directly to the workers. Thus, [this] suggestion would not be appropriate. . . .
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> A commenter suggested that the regulations should provide that a union must give notice to the affected employees it represents within 3-5 days and that a penalty should be imposed upon the union for failure to give notice. WARN contains no provisions imposing any notice obligations on unions. The sugges-

[10] Had the notice to the union been intended merely as an efficient way to transmit notice to the employees individually, notice to local unions, without regard to their status as exclusive representative, would have sufficed.

tion cannot, therefore, be adopted. [Preamble, *supra*, at 46.]

C. In short, Congress provided exclusive representatives with a statutory right to notice *and* a statutory right to sue precisely because the exclusive representative *is*, when it comes to a plant closing, a party whose legal status and legal rights and interests as the employees' representative for workplace matters are directly, immediately, and adversely affected. For that reason, among others, respondents' invocation of *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)—the only case in this Court striking down a Congressional enactment as beyond Congress' powers under Article III—is unavailing. *See* Pet. Br. at 29-30.

Lujan involved a statute requiring consultation between various governmental agencies, and authorizing "any person" to sue for violation of that requirement. 504 U.S. at 572. The Court noted that it has

> consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and law, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy. [504 U.S. at 573-74.]

Viewing the question before it as "whether the public interest in the proper administration of the laws . . . can be converted into an individual right by a statute that denominates it as such," (504 U.S. at 576), the Court concluded that Congress may not effect such a conversion:

> If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that

> the Laws be faithfully executed," Art. II, § 3. . . . We have always rejected that vision of our role[.] [504 U.S. at 577.]

The standing question raised by the *Lujan* statute is far afield from the standing question raised by the WARN Act here. In the first place, the WARN Act generates none of the concerns about shifting responsibility for the enforcement of the laws from the Executive Branch to the Judicial Branch that underlay *Lujan*. Here, as in *Havens Realty*, Congress' sole concern was forging a cause of action to enforce a federal statutory right between private parties, in a context in which there is no public law enforcement role whatever.[11] In this statutory context, involving the authority of Congress to define private rights and private causes of action to vindicate those rights, the Legislature's power is at its zenith.

Consequenty, this Court's standing jurisprudence, as *Havens Realty* illustrates, is that the only pertinent Article III concern here is whether the resulting WARN Act case is presented "in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 93-94 (1968).[12] Any greater standing limitation on Congress'

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[11] The Court's plurality opinion in *Lujan* specifically noted that its holding may have no application beyond "suits against the government" (504 U.S. at 578), while a concurring opinion characterized the Court's holding as defining only an "outer limit to the power of Congress to confer rights of action," leaving that power fundamentally intact. 504 U.S. at 580 (Kennedy, J., concurring). The concurring opinion, in particular, emphasized that:

> Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Courts opinion to state a contrary view. [504 U.S. at 580 (Kennedy, J., concurring).]

[12] Our point in emphasizing that this case (like *Havens Realty*) is distinct from the main stream of the Court's standing cases because this is a case between two private parties, is *not* that, as a result, Congress' actions do not generate any separation of powers concerns. Rather, our point is that those concerns are

Article I powers in this regard would raise separation of powers issues of its own, by asserting an extraordinary judicial authority to negate Congress' considered views concerning the distribution of rights and obligations among private parties.

This case also differs fundamentally from *Lujan* in that the WARN Act does not create a general cause of action to sue over a "generally available grievance" concerning compliance with the laws. As the concurring *Lujan* Justices pointed out, the *Lujan* statute simply conferred a right of action that "[did] not of its own force establish that there is an injury in 'any person' . . ." 504 U.S. at 580 (Kennedy, J., concurring). Here, in contrast, the statute first provides that notice is due *from the employer to the employees' exclusive representative* (not to the public at large or, as in *Lujan*, to some governmental entity), and only then authorizes *that* representative to sue where the employer does not provide the notice. Moreover, the union to whom notice is due necessarily has had previous direct involvement in the affairs of the plant in question through its statutory responsibility for representing the workers in the plant, a role which will necessarily be affected by the plant closing or mass layoff.

For these reasons, the union is no mere concerned bystander attempting to vindicate the public interest, or an interest the union shares in common with the public at large. Thus, the concerns evinced in *Lujan* regarding litigation over claimed injuries felt equally by all mem-

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qualitatively diffeernt—and quantatively less—than where Congress authorizes judicial challenges to governmental action.

That cases finding a lack of Article III standing in disputes that do not challenge governmental action are rare is perhaps best indicated by the fact that Brown Shoe does not cite any such cases, and alters the sense of the primary case that is cited by substituting ellipses for the phrase that makes clear that concerns about challenges to governmental authority *are* central in standing cases. Resp. Br. at 30; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (emphasis supplied) ("The power to declare the rights of individuals *and to measure the authority of governments*, this Court said 90 years ago, 'is legitimate only as a last resort . . .'")

bers of the public have no application. Put another way, the statute involved in *Lujan* would have been parallel to the one in this case only if that statute had provided for consultation with specified, ascertainable persons or groups with an established, statutorily-mandated involvement in the preservation of endangered species, and then authorized those persons or groups to sue if they were not so consulted. Nothing in either the *Lujan* plurality opinion or Justice Kennedy's concurring *Lujan* opinion suggests that there is any constitutional question as to the validity of that kind of hypothetical statute.

3. As to the "redressibility" question, we noted in our opening brief that where a duty flows to one person at least in part to aid that person in forwarding the interests of certain individuals, providing monetary relief to the benefitted individuals on a suit by that person to redress a breach by the defendant of that duty appropriately redresses the plaintiff's legal injury. Pet. Br. at 32.

Brown Shoe objects that none of the three examples we provided to illustrate this point are precisely like the WARN Act. Resp. Br. at 34-35, 40-42. But we are not, of course, contending, that this case *is* a Labor Managements Relations Act § 301 case like *International Union UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), or a third party beneficiary case, or a case in which the government is suing to protect the public interest.

Rather, our point is that in each of these analogous circumstances, as here, a recognized, separate legal interest, albeit one related to forwarding the welfare of other individuals, is vindicated by providing appropriate monetary relief to those individuals. Pet. Br. at 35. That the source of the legal interest is different from that here—contractual, in LMRA § 301 and third-party beneficiary cases, and grounded in governmental authority and statutory authorization in statutes such as Title VII, the FLSA and ERISA granting governmental entities the right to sue to advance the public interest—has no

bearing upon whether remedial schemes of this general structure somehow run afoul of Article III.[13]

Brown Shoe misunderstands, in particular, the pertinence of the third-party beneficiary cases to this case. In those cases, the promisee has traditionally been permitted to enforce its legally-recognized interest in performance of a promise made to the promisee through a suit ordering the promisor to pay money to the third-party beneficiary, even if the relief granted in the lawsuit will provide no direct benefit to the plaintiff. *See, e.g., Drewen v. Bank of Manhattan Co. of City of New York*, 155 A. 2d 529 (N.J. Sup. Ct. 1959), and case cited *id.*, at 533 (seventeenth century English case holding that where A has promised B that A will pay a specified sum of money to C but does not do so, B's administrator can sue for performance of that promise even though B's estate " 'should receive no benefit if he did recover' "); *Croker v. New York Trust Co.*, 156 N.E. 81, 82 (N.Y. 1927) (where A promises B to pay money to C and D, B can sue "to enforce the liability of the promisor to the third party beneficiaries;" although "the promisee has suffered no pecuniary damage by the failure of the promisee to perform [and] [h]is injury at law is, therefore, purely technical", the promisee nonetheless "is interested in asserting the duty of the promisor to carry out the terms of the contract"); *Blair v. Southern Clay Mfg. Co.*, 121 S.W. 2d 570, 571 (Tenn. 1938) (while a third party beneficiary can sue for enforcement of a promise to pay money to him, "[t]he better practice . . . is a suit by [the promisee] to enforce the obligation for the use of C"). Such cases, then, are "in a form historically viewed as capable of resolution through

[13] As the Court recognized in *Lujan, supra*, the redressibility prong of the Article III standing doctrine has to be applied flexibly, taking into account the nature of the legal right being enforced. For example, "[a] person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressibility and immediacy." 504 U.S. at 572 n.7.

the judicial process" (*Flast v. Cohen, supra*, 392 U.S. at 93-94), and are directly relevant to the Article III analysis here for that reason.[14]

4. Finally, Brown Shoe maintains that *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), and related cases, preclude Congress from expressly permitting the union as a statutorily-designated representative of employees to bring suit seeking individual monetary relief for those employees.

Since the plaintiff union is both the holder of the legal right the defendant employer is alleged to have violated here and an authorized litigant to vindicate that right, neither *Hunt* nor *International Union, UAW, supra*, nor *Warth v. Seldin*, 422 U.S. 490 (1975)—all of which involve situations in which the Congressional or statutory

[14] It is, moreover, difficult to understand Brown Shoe's remark that another set of analogous cases, those involving government suits to enforce the public interest which result in payment of monetary relief to each of a group of individuals, suggest that Congress did not intend to permit unions to bring backpay suits under WARN because "the employer has no assurance that any disposition of the WARN claim will preclude further litigation by employees. . . .". Resp. Br. at 42.

The governmental suits certainly do *not* establish any principle that Congress may not provide a party with a legally-cognizable interest in the welfare of certain individuals, a cause of action to recover monetary relief for the latter without requiring in that statute notice to the individuals and without affording them the right to decline participation. To the contrary, *General Telephone Co. v. E.E.O.C.*, 446 U.S. 318, 333 (1980), specifically *declined* to impose those requirements while observing that "[t]he courts are not powerless to prevent undue hardship to the defendant and should perform accordingly" by, *inter alia*, precluding double recovery and requiring any individual who claims under a judgment or settlement to relinquish the right to bring a second suit. *See also International Union UAW v. Brock*, 477 U.S. 274, 290 (1986).

Indeed, if each of the employees proceeds individually, as employees may under the WARN Act, the employer is surely much more likely to face a multiplicity of suits than where the union sues for monetary relief for all represented employees.

obligation enforced ran to individuals rather than to the organization bringing suit—are on point.[15]

Moreover, even without regard to that critical difference in the nature of the legal right enforced, the "associational standing" cases are not informative here. None of those cases confronted or resolved the question whether Article III, as opposed to prudential considerations, requires a distinction between injunctive relief and the kind of narrowly specified monetary relief the WARN Act provides.[16]

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[15] We are puzzled by Brown Shoe's suggestion that the Question Presented in the Petition does not encompass the issue whether the third prong of *Hunt*, precluding associational standing where individualized relief is sought, is prudential in the sense that a Congressional authorization of such relief can be sufficient to satisfy Article III. Associational standing is simply a subcategory of representational standing, as this Court's cases recognize. *See, e.g., Warth, supra*, 422 U.S. at 511 (if the requisite criteria are met, an "association may be an appropriate *representative* of its members" (emphasis supplied)); *Hunt, supra*, 432 U.S. at 345 (because it meets the requisite standards, "the Commission has standing to bring this action in a representational capacity.") Since the Question Presented asks whether Article III precludes Congress from permitting the plaintiff union from suing as the representative of affected employees (Pet. Br. at (i)), that question encompasses representational standing theories generally, including a theory premised, like *Hunt*, on an analogy to associational standing. *See* Petition for Writ of Certiorari at 14-20 (discussing *Hunt* and prudential standing considerations at length).

[16] The relief sought here, moreover, is *not* the type of *individualized* damages relief involved, for example, in *Warth*. 422 U.S. at 515 (organization of home builders may not recover for business opportunities and profits lost by individual builders). Rather, the relief in a WARN Act case will almost always be figured from the payroll records of the defendant employer exclusively, with no need for individual testimony by affected employees. (The only exception would occur if the exclusive representative attempts to recover under § 2104(a)(1)(B) for medical expenses incurred during an employment loss; the *Warth* line of cases, even if applicable, would then require only that the particular employees for whom such relief is sought be joined in the suit.)

Respondent insists, nonetheless, that the dicta in *Hunt* to the effect that voluntary associations cannot bring suit where "the relief requested requires the participation of individual members in the lawsuit" (432 U.S. at 343) is constitutionally-based, because of "the redressibility problem posed by associational damage suits." Resp. Br. at 38.[17] *Warth*, the case from which the *Hunt* criteria were derived, however, only goes so far as to state that the first of the three "associational standing" criteria—that the individual members fulfill the bedrock injury-in-fact Article III requirement—is constitutionally mandated. *Warth*, 422 U.S. at 511 (because "[t]he possibility of representational standing . . . does not eliminate the constitutional requirement of a case or controversy," an association, in order to represent its members, "must allege that its members or any one of them are suffering immediate or threatened injury as a result of the challenged action.")

The concern articulated in *Warth* as underlying the individualized relief prong, in contrast—whether "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured," (422 U.S. at 515)—is a sensible prudential concern that, absent a Congressional or other legislative or traditional determination that a designated representative *can* seek monetary relief flowing to specified individuals, there will be grave difficulty in deter-

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[17] *Hunt* was not a suit seeking individual monetary relief. Moreover, while *Hunt* did involve a state agency entrusted with advancing the interests of a designated group of individuals rather than a voluntary association, that agency was not designated by either a state or federal statute or by the federal constitutional provision invoked as the authorized representative of the individual apple growers for purpose of pursuing individualized monetary relief. The general authority of the Washington State Apple Advertising Commission "to sue and be sued" (432 U.S. at 338 n.3) as a corporate entity does not constitute the kind of express *representational* authorization to protect the legal interests of designated individuals involved here and in the various examples discussed in our opening brief (at 36-43), nor is there any indication of concomitant fiduciary obligations (Pet. Br. at 41).

mining who among a voluntary association's members is "actually injured" and in assuring that those individuals receive the moneys due. Where there is such a Congressional determination, accompanied, as here, by fiduciary or analogous obligations,[18] however, the long history of representational litigation shows that the statutory designation is quite sufficient to indicate "reasonably . . . that the relief if granted will inure to" the represented individuals, whether the relief is injunctive or monetary. Pet. Br. at 42-46.[19]

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the United States Court of Appeals for the Eighth Circuit should be reversed.

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[18] The association standing issue concern expressed in *Warth* with regard to individualized relief—like any standing issue concern—arises only if suit is actually brought, not by reason of the association's inaction. And, as noted in our opening brief, once a representative does file a WARN Act suit, the duty of fair representation obtains. Pet. Br. at 12, n.4.

[19] We note that Brown Shoe is quite wrong in its suggestion that representational litigation depends on the representative having "title." *See* Uniform Probate Code §§ 3-101, 102 & comment to 711; 33 C.J.S. 2d § 252 (generally executors and administrators do not have title to heir's property). In any event, *Warth* at most suggests that any Congressional action providing representational authority in a suit for individual relief be reviewed to determine whether the statutory scheme is reasonably calculated to assure that the intended beneficiaries receive the relief to which they are entitled. For all the reasons surveyed above and in our opening Brief (at 16-27), the interrelated substantive and enforcement schemes of the WARN Act meet that test.

Respectfully submitted,

JONATHAN P. HIATT
815 16th Street, N.W.
Washington, D.C. 20006

MARSHA S. BERZON
SCOTT A. KRONLAND
MARY LYNNE WERLWAS
177 Post Street, Suite 300
San Francisco, CA 94108

GEORGE MURPHY
RENEE L. BOWSER
1775 K Street, N.W.
Washington, D.C. 20006

LAURENCE GOLD
(Counsel of Record)
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340